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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

IRMA MAGYAR et al.,	
Plaintiffs and Respondents,	E070108
v.	(Super.Ct.No. CIVDS1709381)
LAUREL AVENUE, LLC,	OPINION
Defendant and Appellant.	

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed.

Wilson Getty, William C. Wilson and Dawn A. Phleger for Defendant and Appellant.

Peck Law Group and Steven C. Peck for Plaintiffs and Respondents.

I. INTRODUCTION

Defendant and appellant, Laurel Avenue, LLC dba Terracina Post Acute (Terracina), appeals from an order denying its motion to compel arbitration.

On appeal, Terracina argues the trial court erred because plaintiff and respondent, Erika Ostrove (Ostrove), is not a third party to the arbitration agreement under Code of Civil Procedure section 1281.2, subdivision (c)[1] and therefore the trial court was obligated to grant the petition to compel arbitration. We affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs and respondents are Irma Magyar (Magyar), by and through her successor-in-interest Ostrove, and Ostrove individually. According to the complaint,[2] Ostrove is Magyar's granddaughter and her successor in interest. Plaintiffs allege that Terracina and defendant, Braswell's Colonial Care[3] (collectively defendants), ran 24-hour skilled nursing facilities. Magyar became a resident of defendants' facilities and placed herself under their care on June 23, 2012. Magyar was over the age of 65 at the time.

Just prior to taking up residence with defendants, Magyar signed an agreement (Arbitration Agreement) to arbitrate "any dispute as to medical malpractice," and "any dispute between [Magyar] and [Terracina] . . . including any action for injury or death arising from negligence, intentional tort and/or statutory causes of action," except claims under Health and Safety Code section 1430 or California Code of Regulations, title 22,

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

[2] All facts are taken from the complaint, pleadings, and facts submitted respecting the petition to compel arbitration.

[3] Braswell's Colonial Care is not a party to this appeal.

section 72527. The Arbitration Agreement also provided that it could "be rescinded by written notice within thirty (30) days of signature." The Arbitration Agreement is expressly binding on the signatory's successors, family members, and heirs. There is no evidence in the record that Magyar rescinded the Arbitration Agreement, and neither party claims that Magyar was incompetent to sign it.

Magyar died while under the care and custody of defendants on July 14, 2016. Magyar "had multiple falls with injury, developed Sepsis, and E. Coli Urinary Tract Infection [*sic*] which lead [*sic*] to her untimely death."

On May 17, 2017, plaintiffs filed suit against defendants. Plaintiffs alleged four causes of action: (1) elder abuse pursuant to Welfare and Institutions Code section 15600 et seq., (2) negligence, (3) violation of resident's rights pursuant to Health and Safety Code section 1430, subdivision (b), and (4) wrongful death. The first three of these were pled as survivor actions on behalf of Magyar, while the fourth was brought in Ostrove's personal capacity. Terracina answered the complaint on June 16, 2017.

On October 3, 2017, counsel for Terracina sent a letter to counsel for Ostrove demanding a stipulation to arbitrate plaintiffs' claims and dismiss the complaint. Plaintiffs responded the same day that they would not so stipulate. In response, on November 14, 2017, Terracina filed a petition to compel arbitration. Plaintiffs opposed this petition. Plaintiffs voluntarily dismissed their negligence cause of action on November 21, 2017.

The motion came on for hearing on February 14, 2018. After hearing argument from the parties, the trial court denied the petition. It stated at the hearing on Terracina's petition to compel that "[t]he fourth cause of action for wrongful death by Ostrove individually is also [not][[4]] subject to arbitration," and that because only one arbitrable claim remained it would "exercise it's [*sic*] discretion and deny" the petition to compel. The court intimated that the fourth cause of action was not arbitrable because it was brought individually by Ostrove and "she never agreed to the arbitration."

Terracina timely appealed the trial court's decision.

III. DISCUSSION

Terracina argues that the trial court erred by denying the petition to compel because Ostrove was not a third party to the agreement and therefore the court had no discretion to deny the petition. We disagree.

A. *Section 1281.2's Third Party Litigation Exception and the Standard of Review*

California law strongly favors arbitration as a matter of public policy. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 443.) Accordingly, where there is a valid agreement to arbitrate between any parties, section 1281.2 provides only four circumstances under which a court may deny a petition to compel arbitration. (§ 1281.2, subds. (a)-(d).) The first is where a party waives his or her right to compel arbitration (see *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th

[4] Though the transcript does not include the word "not" here, from the context it appears that this was either a transcription error or an unintentional misstatement by the court.

1187, 1195, fn. 4); the second is where there is reason to believe the agreement has been or can be rescinded (see *Engalla Permanente Medical Group, Inc.*(1997) 15 Cal.4th 951, 973); and the fourth applies to government chartered depository institutions (§ 1281.2 subd. (d)).

The third exception, enshrined in section 1281.2, subdivision (c) and referred to as the third party litigation exception, "applies when (1) '[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party . . .'; (2) the third party action 'aris[es] out of the same transaction or series of related transactions'; and (3) 'there is a possibility of conflicting rulings on a common issue of law or fact.'" (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 967-968, quoting § 1281.2, subd. (c).) "For purposes of the statute, a third party is one who is neither bound by nor entitled to enforce the arbitration agreement." (*Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 679 (*Daniels*).)

"There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed." (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

Where, as here, there is no material evidentiary dispute, we review the trial court's denial of arbitration de novo. (*Pinnacle Museum Tower Assn. v. Pinnacle Market*

Development (US), LLC (2012) 55 Cal.4th 223, 236.) "Specifically, whether a defendant is in fact a third party for purposes of . . . section 1281.2, subdivision (c), is a matter of law subject to de novo review." (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1406.)

However, if a reviewing court finds that "the third party exception applies, the trial court's discretionary decision as to whether to stay or deny arbitration is subject to review for abuse." (*Laswell v. AG Seal Beach, LLC*, *supra*, 189 Cal.App.4th at p. 1406.) This includes "the ultimate determination whether to stay or deny arbitration based on the possibility of conflicting rulings on common questions of law or fact . . . ." (*Daniels, supra*, 212 Cal.App.4th at p. 680.) "'The abuse of discretion standard . . . ". . . asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts."'" (*Roth v. Plikaytis* (2017) 15 Cal.App.5th 283, 290, quoting *People v. Giordano* (2007) 42 Cal.4th 644, 663.)

Here, there does not appear to be a serious dispute that the cause of action relating to the alleged violation of the resident's rights is not arbitrable. The Arbitration Agreement expressly excepts such claims.

B. *Analysis of Third Party Exception to Ostrove*

Terracina argues that plaintiffs' wrongful death claim must be arbitrated because neither the third party litigation exception nor any other exception to section 1281.2 applies to Ostrove. In particular, Terracina argues that the Arbitration Agreement is governed by section 1295. For the reasons stated below, we disagree on both counts.

Section 1295 is part of California's Medical Injury Compensation Reform Act (MICRA). Section 1295 requires that "[a]ny contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider," include mandatory language notifying the signatory that they are waiving their right to sue in court and that "'any dispute as to medical malpractice . . . will be determined by submission to arbitration . . . .'" (§ 1295, subd. (a).)

"Professional negligence" under section 1295 means "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (§ 1295, subd. (g)(2).) Skilled nursing facilities are health care providers under MICRA. (*Guardian North Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963, 974.) The third party litigation exception does not apply to "agreement[s] to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295." (§ 1281.2, subd. (c).) Such agreements remain subject to arbitration. Further, such agreements may be made expressly binding on the heirs and family members of the patient signing the agreement.

In *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, the California Supreme Court explained "that section 1295 . . . is designed to permit patients who sign arbitration agreements to bind their heirs in wrongful death actions," and that therefore arbitration

agreements created pursuant to section 1295 can be enforced against heirs seeking wrongful death claims. (*Ruiz v. Podolsky*, *supra*, at pp. 849, 854.) Moreover, the court noted that "section 1295, subdivision (a) contemplates arbitration 'of any dispute as to professional negligence of a health care provider,'" including wrongful death claims based on allegations of professional negligence. (*Id.* at p. 849.)

However, a panel of this court distinguished *Ruiz* in a subsequent decision, *Daniels*, *supra*, 212 Cal.App.4th 674. In that case, a 92-year-old woman was admitted as a resident of a residential care facility for the elderly. (*Id.* at p. 677.) Prior to becoming a resident, her attorney in fact, Daniels, signed a residency agreement with an arbitration clause which bound the parties and their "'spouse, heirs, representatives, executors, administrators, successors and assigns . . . .'" (*Id.* at pp. 677-678.) After becoming a resident, the woman developed pressure sores, which cascaded into a series of health issues culminating in her death. (*Id.* at p. 677.) After her death, Daniels brought survivor claims and a wrongful death claim. (*Id.* at pp. 677-678.) The defendant petitioned to compel arbitration and the trial court denied the petition. (*Id.* at pp. 678-679.)

In *Daniels*, we affirmed the trial court's denial of the petition to compel arbitration. We first noted that a plaintiff's "wrongful death claim is personal to her and lies independent of . . . survivor claims," and that "[a]s a general rule, a party cannot be compelled to arbitrate a dispute that he or she has not agreed to resolve by arbitration." (*Daniels*, *supra*, 212 CalApp.4th at p. 680.) We further concluded that "there is no basis to infer that Daniels agreed to arbitrate her wrongful death claim. In context, the

provision making the arbitration clause binding on heirs means only that the duty to arbitrate the survivor claims is binding on . . . persons who would assert the survivor claims on [decedent's] behalf . . . ." (*Id.* at p. 681.)

In discussing *Ruiz* this court explained: "*Ruiz* is based squarely on section 1295, which governs agreements to arbitrate professional negligence or medical malpractice claims . . . ." (*Daniels, supra*, 212 Cal.App.4th at p. 682.) We recognized that the decision was driven by the unique nature of section 1295, because "the Legislature's intent in enacting section 1295 effectively supersedes two other competing principles: that wrongful death claims are independent actions accruing to the decedents' heirs, and that arbitration agreements are generally not binding on third party nonsignatories." (*Daniels*, *supra*, at p. 683.) Accordingly, this court declined to extend *Ruiz* "to arbitration agreements not governed by section 1295, or that are entered into with a person other than a health care provider for claims other than medical malpractice." (*Daniels*, *supra*, at p. 683.)

Our colleagues in Division Three agreed with this reasoning in *Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835 (*Avila*). In that case, an 87-year-old man was admitted to an acute care hospital, where a feeding tube allegedly became dislodged and caused the elderly man to aspirate. (*Id.* at p. 838.) The decedent's son previously signed an arbitration agreement on decedent's behalf that included the necessary language from section 1295. (*Avila, supra,* at p. 838.) The decedent's son

sued for "'negligence/willful misconduct,'" elder abuse, and wrongful death. (*Id.* at p. 839.)

The court in *Avila* agreed with this court in *Daniels* that *Ruiz* carved out "an exception to the general rule that arbitration agreements must be the subject of consent rather than compulsion." (*Avila*, *supra*, 20 Cal.App.5th at p. 841.) Thus, the central question was "whether *Ruiz* is controlling here," which requires "determin[ing] whether this case is about 'professional negligence,' as defined by MICRA . . . ." (*Id.* at p. 842.)

In making that determination "[w]hat matters is . . . the basis of the claims as pleaded in the complaint. If the primary basis for the wrongful death claim sounds in professional negligence . . . then section 1295 applies. If . . . the primary basis is under the Elder Abuse and Dependent Adult Civil Protection Act [citations] . . . , then section 1295 does not apply and neither does *Ruiz* . . . ." (*Avila*, *supra*, 20 Cal.App.5th at p. 842.) The precise nature of the care facility or their licensing does not control, only the allegations in the complaint. (*Ibid.*) "Plaintiffs . . . are essentially free to plead their case as they choose. . . . The fact that they could have also pleaded a claim for medical malpractice, had they wished to do so, is irrelevant." (*Id.* at p. 843.)

As in *Avila*, the complaint in the instant case contains allegations that could be categorized as both professional negligence as well as elder abuse. Under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) """the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care."""" (*Avila*, *supra*, 20 Cal.App.5th at p. 843,

quoting *Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, 89.) Plaintiffs allege that Terracina "neglected to provide medical care," by failing to accurately inform her physicians, carry out their orders, or perform basic care to prevent Magyar from becoming dehydrated or developing pressure ulcers, infections, and fractures. The complaint alleges that numerous health conditions which contributed to Magyar's death went unnoticed and untreated. The primary basis for the wrongful death claim is neglect, not professional negligence by a health care provider.

Plaintiffs were free to plead their case as one for professional negligence or elder abuse. They chose to plead a cause of action for elder abuse and have done so successfully. Thus, we hold that the Arbitration Agreement is not controlled by section 1295. While Magyar could bind herself to arbitration of her elder abuse claims, the Arbitration Agreement does not bind Ostrove as to her wrongful death claim.

Because Ostrove's wrongful death cause of action is her own and she is not a signatory to the Arbitration Agreement, we also conclude that Ostrove is a third party under the meaning of section 1281.2, subdivision (c).

C. *The Court Did Not Abuse Its Discretion*

Because we find that Ostrove was a true third party to the Arbitration Agreement under section 1281.2, subdivision (c), we next turn to whether the court abused its discretion in denying the petition to compel arbitration. Terracina contends the trial court abused its discretion because the mere existence of some nonarbitrable claims does not,

on its own, permit the court to retain jurisdiction over both arbitrable and nonarbitrable claims.

"The court's discretion under section 1281.2, subdivision (c) does not come into play until it is ascertained that the subdivision applies . . . ." (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1288, fn. 6.) As discussed above, there are three conditions necessary for section 1281.2, subdivision (c) to apply: (1) there must be ongoing litigation between a signatory and a third party; (2) this litigation arises out of the same facts, incidents, or transactions as the dispute between signatories; and (3) conflicting rulings may result if these disputes are heard separately in arbitration and in court. (*Acquire II, Ltd. v. Colton Real Estate Group, supra*, 213 Cal.App.4th at pp. 967-968.)

"A trial court has no discretion to deny or stay arbitration unless all three of section 1281.2[, subdivision] (c)'s conditions are satisfied." (*Acquire II, Ltd. v. Colton Real Estate Group, supra*, 213 Cal.App.4th at p. 968.) "Whether there are conflicting issues arising out of related transactions is a factual determination subject to review under the substantial evidence standard." (*Id.* at p. 972.) "[T]he allegations of the parties' pleadings may constitute substantial evidence sufficient to support a trial court's finding that section 1281.2[, subdivision] (c) applies." (*Ibid.*)

Once these conditions are met, the court may exercise its discretion to choose among four options: (1) "refuse to enforce the arbitration agreement," (2) "order intervention or joinder as to all or only certain issues," (3) order arbitration as to the

parties in agreement and stay the pending court action, or (4) stay the arbitration until completion of the pending court action. (§ 1281.2.)

All three conditions necessary for the court to exercise discretion are met here. As discussed above, Ostrove is a third party because she is not bound by the Arbitration Agreement. (*Daniels*, *supra*, 212 Cal.App.4th at p. 680.) There is also no dispute that Ostrove's wrongful death cause of action arises from the same set of operative facts as Magyar's elder abuse cause of action. Finally, given that Ostrove's wrongful death action is premised on the elder abuse action, there is substantial evidence to support the conclusion that litigating them separately will result in inconsistent rulings on common questions of law or fact.

Defendants argue "[t]he mere fact that some claims are arbitrable and some are not is surely not the 'peculiar situation' meant to be addressed by section 1281.2[, subdivision] (c) according to our Supreme Court." (*RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1521; see also *Laswell v. AG Seal Beach, LLC*, *supra*, 189 Cal.App.4th at p. 1409.) But as this court pointed out in *Daniels*, "[b]oth *Laswell* and *RN Solution* are distinguishable because neither involved a third party to the arbitration agreement for purposes of . . . section 1281.2[, subdivision] (c)." (*Daniels*, *supra*, 212 Cal.App.4th at p. 687.) These cases thus rejected the notion that parties to the arbitration agreement can defeat attempts to compel them into arbitration simply by asserting nonarbitrable claims. (*Ibid.*) Where the third party litigation

exception applies, the trial court is well within its rights to deny a motion to compel arbitration and retain jurisdiction over both the arbitrable and nonarbitrable claims.

Therefore, the trial court's decision to deny the petition to compel arbitration was not outside the bounds of reason, and was not an abuse of discretion.

IV. DISPOSITION

The order denying defendants' motion to compel arbitration is affirmed. Plaintiffs are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.278.)

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FIELDS
J.

We concur:

McKINSTER
Acting P. J.

RAPHAEL
J.